



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[Docket No. FHWA-2018-0033]**

**Proposed Memorandum of Understanding (MOU) Assigning Certain Federal Environmental Responsibilities to the State of Nebraska, Including National Environmental Policy Act (NEPA) Authority for Certain Categorical Exclusions (CEs)**

**AGENCY:** Federal Highway Administration (FHWA).

**ACTION:** Notice of proposed MOU, request for comments.

**SUMMARY:** The FHWA and the State of Nebraska, acting by and through its Department of Transportation (State), propose participation of the State in the Categorical Exclusion Assignment program. This program allows FHWA to assign its authority and responsibility for determining whether certain designated activities within the geographic boundaries of the State, as specified in the proposed Memorandum of Understanding (MOU), are categorically excluded from preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by DOT Document Management System (DMS) Docket Number FHWA-2018-0033, by any of the methods described below. To ensure that you do not duplicate your submissions, please submit them by only one of the means below. Electronic or facsimile comments are preferred because Federal offices experience intermittent mail delays from security screening.

Federal eRulemaking Portal: Go to Web site: <http://www.regulations.gov/>. Follow the instructions for submitting comments on the DOT electronic docket site.

Facsimile (Fax): 1-202-493-2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590.

Hand Delivery: 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except Federal holidays.

For access to the docket to view a complete copy of the proposed MOU, or to read background documents or comments received, go to <http://www.regulations.gov/> at any time, or to 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Melissa Maiefski; by email at [Melissa.Maiefski@dot.gov](mailto:Melissa.Maiefski@dot.gov) or by telephone at 402-742-8473. The Nebraska Division Office's normal business hours are 8 a.m. to 5:00 p.m. (Central Standard Time), Monday through Friday, except Federal holidays. For the State of Nebraska: Brandie Neemann: by email at [Brandie.Neemann@nebraska.gov](mailto:Brandie.Neemann@nebraska.gov) or by telephone at 402-479-4795. The Nebraska Department of Transportation's business hours are 8 a.m. to 5 p.m. (Central Standard Time), Monday through Friday, except State and Federal holidays.

**SUPPLEMENTARY INFORMATION:**

## **Electronic Access**

Internet users may reach the Office of the Federal Register's home page at: <http://www.archives.gov/> and the Government Publishing Office's database at: <http://www.fdsys.gov/>. An electronic version of the proposed MOU may be downloaded by accessing the DOT DMS docket, as described above, at <http://www.regulations.gov>.

## **Background**

Section 326 of Title 23 U.S. Code, creates a program that allows the Secretary of the U.S. Department of Transportation (Secretary), to assign, and a State to assume, responsibility for determining whether certain highway projects are included within classes of action that are categorically excluded (CE) from requirements for environmental assessments or environmental impact statements pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. (NEPA). In addition, this program allows the assignment of other environmental review requirements applicable to Federal highway projects. The FHWA is authorized to act on behalf of the Secretary with respect to these matters.

The FHWA would execute Nebraska's participation in this program through an MOU. Statewide decision making responsibility would be assigned for all activities within the categories listed in 23 CFR 771.117(c) and those listed as examples in 23 CFR 771.111(d), and any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU. In addition to the NEPA CE determination responsibilities, the MOU would assign to the State the responsibility for conducting Federal environmental

review, consultation, and other related activities for projects that are subject to the MOU with respect to the following Federal laws and Executive Orders:

- Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q. *Including determinations for project-level conformity if required for the project*
- Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918
- Compliance with the noise regulations in 23 CFR part 772 (except approval of the State noise policy in accordance with 23 CFR 772.7)
- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, and 1536
- Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712
- Bald and Golden Eagle Treaty Act, as amended, 16 U.S.C. §§ 668 – 668c
- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-mm.
- Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. §§ 312501-312508
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013; 18 U.S.C. § 1170
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. § 303; 23 CFR part 774

- American Indian Religious Freedom Act, 42 U.S.C. § 1996
- Farmland Protection Policy Act (FPPA), 7 U.S.C. §§ 4201–4209
- Clean Water Act, 33 U.S.C. §§ 1251–1377, Sections 401, 404, and 319
- Rivers and Harbors Act of 1899, 33 U.S.C. § 403
- Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. §§ 3921, 3931
- Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(3)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001–4128
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j–6
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. 303; and 23 CFR part 774
- Land and Water Conservation Fund (LWCF), Pub. L. 88-578, 78 Stat. 897 (known as Section 6(f))
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675
- Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9671 – 9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k
- Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. § 319
- E.O. 11990, Protection of Wetlands

- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. sections 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 11593, Protection and Enhancement of Cultural Resources
- E.O. 13007, Indian Sacred Sites
- E.O. 13175 Consultation and Coordination with Indian Tribal Governments
- E.O. 13122 and E.O. 13751, Invasive Species
- Planning and Environmental Linkages, 23 U.S.C. § 168, except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. § 169 except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135.

The MOU allows the State to act in the place of FHWA in carrying out the functions described above, except with respect to government-to-government consultations with federally recognized Indian Tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian Tribes, which is required under some of the above-listed laws and Executive Orders. The State may also assist FHWA with formal consultations, with consent of a tribe, but FHWA remains responsible for the consultation.

This assignment includes transfer to the State of Nebraska the obligation to fulfill the assigned environmental responsibilities on any proposed projects meeting the criteria in Stipulation 1(B) of the MOU that were determined to be CEs prior to the effective date of the proposed MOU but that have not been completed as of the effective date of the MOU.

The FHWA will consider the comments submitted on the proposed MOU when making its decision on whether to execute this MOU. The FHWA will make the final, executed MOU publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 326; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 40 CFR 1507.3, 1508.4.

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Division Administrator,  
Federal Highway Administration.

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